

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	

In the Matter of	)	
	)	
Implementation of the Cable	)	MM Docket No. 92-260
Television Consumer Protection	)	
and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	

**PETITION FOR RECONSIDERATION**

The Consumer Electronics Manufacturers Association ("CEMA") hereby petitions the Commission for reconsideration of its *Order*<sup>1</sup> in this proceeding pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429. In particular, CEMA seeks reconsideration of the Commission's decision not to preempt state mandatory access statutes that thwart its procompetitive cable inside wiring rules. CEMA urges the Commission, on reconsideration, to preempt all state mandatory access statutes to the extent that they conflict with the Commission's market-opening cable inside wiring rules. Without such preemption, competition and consumer choice for video programming in multiple dwelling unit ("MDU") buildings will never be realized on a nationwide basis.

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<sup>1</sup> *Telecommunications Services Inside Wiring -- Customer Premises Equipment*, Order and Second Further Notice of Proposed Rulemaking, FCC 97-376, CS Docket No. 95-184 (rel. Oct. 17, 1997) ("*Order*").

**I. THE COMMISSION SHOULD PREEMPT ALL STATE MANDATORY ACCESS STATUTES THAT WOULD PREVENT ITS CABLE INSIDE WIRING RULES FROM TAKING EFFECT UNIFORMLY THROUGHOUT THE UNITED STATES**

Nearly 20 states have enacted some form of mandatory access law, including some states with the largest MDU markets for video programming (*e.g.*, New York, Pennsylvania, Illinois, Florida).<sup>2</sup> Such laws generally benefit only the franchised cable operator, to the detriment of alternative providers of video services. For example, the Pennsylvania statute states that the cable operator "shall retain ownership of all wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises."<sup>3</sup> Absent federal preemption of these statutes, the Commission's cable inside wiring rules will not apply in a significant number of large states.

The *Order* states that the Commission's procedural framework for disposition of cable inside wiring will apply *only* "in mandatory access states to the extent state law does not permit the incumbent to maintain its home wiring (in the case of building-by-building disposition) or a particular home run wire to a particular subscriber (in the case of unit-by-unit

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<sup>2</sup> See, *e.g.*, N.Y. Pub. Serv. Law § 228; 68 Pa. Cons. Stat. § 250.503-B; 55 Ill. Comp. Stat. 5/5-1096; Fla. Stat. § 718.1232; Mass. Gen. Laws ch. 166A, § 22; N.J. Rev. Stat. § 48:5A-49; W. Va. Code § 5-18A-4(d); Kan. Stat. Ann. § 58-2553(5); Me. Rev. Stat. Ann. tit. 14, § 6041; R.I. Gen. Laws § 39-19-10; D.C. Code Ann. § 43-1844.1.

<sup>3</sup> 68 Pa. Cons. Stat. § 250.503-B. See also N.Y. Pub. Serv. Law § 228(1)(a); W. Va. Code § 5-18A-4(d) ("The cable operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a cable system within any multiple dwelling premises."). In addition, other states have delegated regulation of cable services to local authorities, which guarantee incumbent operators similar mandatory access rights. See, *e.g.*, Ga. Code. Ann. § 36-18-2.

disposition) against the will of the MDU owner."<sup>4</sup> Although the Commission adopted a presumption that state law does not give incumbent operators a legally enforceable right to maintain cable inside wiring against the wishes of the MDU owner, the *only* thing an incumbent operator must do in order to nullify the Commission's cable inside wiring rules is to obtain a preliminary injunction from a state court within 45 days of the initial notice.<sup>5</sup>

During the last comment round in this proceeding, the incumbent cable operators - who are apparently quite familiar with these statutes -- stated that most mandatory access statutes do not hinge on a tenant's request for service, and that in those few that do, franchised cable operators have the right to maintain their cable wiring throughout the MDU indefinitely.<sup>6</sup> Incumbent operators will, inevitably, seek a preliminary injunction from state courts *every time* an MDU owner gives them an initial termination notice and will, invariably, argue forcefully to the court that the mandatory access statute gives them the legal right to remain in the MDU. While the Commission is "unwilling" to conclude that these access statutes always grant incumbent operators such a legally enforceable right,<sup>7</sup> state courts may often be willing to grant a temporary injunction pending a resolution of the issue.

Based on the language of these statutes, state courts may well determine that incumbent operators *do* have a legally enforceable right to stay on the premises. Even if a state court rules against incumbent operators, the court proceedings will interminably delay

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<sup>4</sup> *Order* at ¶ 79.

<sup>5</sup> *Id.* at ¶ 77.

<sup>6</sup> *Id.* at ¶ 71.

<sup>7</sup> *Id.* at ¶ 79.

implementation of the Commission's cable inside wiring rules. In any case, leaving the fate of the rules to a multitude of state courts creates significant uncertainty as to whether and when the rules will ever bring competition and consumer choice to video programming in several of the Nation's major markets. By permitting state courts to exclude these major markets from the Commission's cable inside wiring rules, the rules will be rendered ineffective.

The *Order's* approach is curious, given the Commission's stated concern that state laws may not provide alternative providers with a level playing field with respect to access to MDU buildings.<sup>8</sup> CEMA urges the Commission to preempt the state laws, rather than merely "encourage" states to examine the effects of their mandatory access laws.<sup>9</sup> Only through preemption of state mandatory access laws will the Commission ensure alternative video providers with competitive access to MDU buildings.

**II. THE ORDER IS INCONSISTENT WITH SECTION 601 OF THE COMMUNICATIONS ACT AND SECTION 207 OF THE TELECOMMUNICATIONS ACT OF 1996, WHICH DIRECT THE COMMISSION TO CREATE A "NATIONAL POLICY" DESIGNED TO "PROMOTE COMPETITION IN CABLE COMMUNICATIONS"**

Both Section 601 of the Communications Act and Section 207 of the Telecommunications Act of 1996 require that the Commission preempt state mandatory access statutes. In Section 601, Congress directed the Commission to create a "national policy" that will "promote competition in cable communications."<sup>10</sup> A national policy requires that the same

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<sup>8</sup> See *id.* at ¶ 190 ("We remain concerned . . . about disparate regulation of MVPDs that unfairly skews competition in the multichannel video programming marketplace.").

<sup>9</sup> *Id.* at ¶ 190.

<sup>10</sup> 47 U.S.C. § 521.

procompetitive cable inside wiring rules must be applied equally to *all* states in the United States. There is no sound reason for allowing incumbent video operators to maintain their MDU monopoly in a substantial number of states. Cable inside wiring rules that will not apply in a substantial number of states, and that merely "encourage" states to evaluate their own laws,<sup>11</sup> fall far short of the Commission's duty to create a "national policy" to promote competition in cable communications.

The *Order's* failure to preempt state mandatory access statutes also violates Section 207 of the Telecommunications Act, which mandates consumer choice in video programming services. In past proceedings, the Commission has applied Section 207 to "ensure that consumers have access to a broad range of video programming services, and . . . foster full and fair competition among different types of video programming services."<sup>12</sup> The Commission, moreover, has preempted certain local zoning ordinances based on its understanding that "Section 207 evidences Congress's recognition that the federal interests at stake . . . warrant the preemption of inconsistent state and local regulations, even when those regulations address a traditionally local subject such as land use."<sup>13</sup>

Section 601 and Section 207 must be considered in tandem. Without competitive access to cable inside wire, one of the fundamental procompetitive policies underlying the 1996

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<sup>11</sup> *Order* at ¶ 190.

<sup>12</sup> *Preemption of Local Zoning Regulation of Satellite Earth Stations; In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996*, 11 FCC Rcd 19276, 19281 (1996).

<sup>13</sup> *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5812 (1996).

Act -- subscriber choice in video programming services -- will be jeopardized. Simply put, Section 601 mandates the creation of a national policy to facilitate competition in cable communications, and Section 207 mandates federal preemption of state or local laws that would jeopardize this policy.

### **III. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO PREEMPT STATE MANDATORY ACCESS STATUTES**

The Commission's statutory authority to preempt state mandatory access laws is beyond question. Courts have upheld FCC jurisdiction in several analogous cases. For example, courts have ruled that the Commission's Section 1 preemption authority extends to cable television. In 1984, the U.S. Supreme Court ruled that the Commission may preempt virtually any state regulation involving cable television if it conflicts with the federal policy of promoting the widespread availability of cable service nationwide.<sup>14</sup> This reasoning logically should extend to the Commission's authority to preempt state and local laws that hamper national procompetitive objectives, such as access to cable inside wiring. Similarly, with respect to video services, the U.S. Court of Appeals for the Second Circuit has held that the Commission could

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<sup>14</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984); see also *Cable Television Association of New York, Inc., v. William B. Finneran*, 954 F.2d 91, 97 (2d Cir. 1992) (noting that "the Court placed within the FCC's discretion the power to pre-empt virtually any state regulation of the cable industry."). Although the Supreme Court decided this case before Congress enacted the 1984 Cable Act, which stripped the Commission of some regulatory authority, the 1992 Cable Act restored to the Commission much of this authority.

preempt state regulations aimed at regulating master antenna systems in MDU buildings because these regulations had the effect of impeding the growth of interstate wireless cable services.<sup>15</sup>

Conversely, courts have rejected the argument that cable wiring is an intrastate service and thus not within the Commission's jurisdictional purview. This view was expressed most recently in 1996, when a U.S. District Court concluded that "[f]ederal preemption may provide a defense to . . . underlying state law causes of action" such as a claim by a cable operator that an MDU owner had breached a contractual provision giving the cable operator exclusive rights to the cable wiring in the MDU.<sup>16</sup>

Based on the foregoing, the Commission has ample authority under Section 1 of the Communications Act to preempt state mandatory access laws that prevent alternative video providers from accessing the cable wiring in MDUs. The Commission should fully utilize this preemption authority in order to achieve its objective of promoting the availability of competitive video services to MDUs nationwide.

## CONCLUSION

CEMA respectfully requests that the Commission reconsider its decision allowing state courts to determine whether the Commission's cable inside wiring rules are applicable in their states. Congress intended that the Commission develop a national procompetitive policy. Allowing state courts to decide whether the Commission's cable inside wiring rules apply in their

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<sup>15</sup> *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 64 (2d Cir. 1982).

<sup>16</sup> *Time Warner Entertainment v. Foster Management*, 1996 U.S. Dist. LEXIS 14587, at \*17 (M.D.N.C. 1996).

states will result in interminable legal delay and prevent significant portions of the American public from enjoying the benefits of consumer choice in video programming, which is required by Section 601 of the Communications Act and Section 207 of the Telecommunications Act of 1996. CEMA therefore urges the Commission to ensure that alternative video providers have competitive access to MDU buildings on a *nationwide* basis by preempting all state mandatory access statutes that would prevent its cable inside wiring rules from taking effect immediately.

Respectfully submitted,

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